

ORIGINAL

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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Illinois Commerce Commission
RAIL SAFETY SECTION

COUNTY OF COOK, et al.,)

Petitioners,)

v.)

No. T-05-0051

ILLINOIS CENTRAL RAILROAD)
COMPANY and THE STATE OF ILLINOIS,)
DEPARTMENT OF TRANSPORTATION,)

Respondents.)

ILLINOIS CENTRAL'S RESPONSE TO PETITIONERS' MOTION TO BAR

Respondent, Illinois Central Railroad Company ("Illinois Central"), by its attorneys, Freeborn & Peters LLP, pursuant to Illinois Supreme Court Rules 201(k) and 219, for its Response to Petitioners' Pre-Trial Motion to Bar Respondent's Witnesses From Testifying on Matters Not Disclosed at Their Depositions and to Exclude Materials Not Produced or Relied Upon by Respondent's at the Time of Their Witnesses Depositions (the "Motion to Bar"), states as follows:

I. Introduction.

1. Petitioners have filed a Commerce Commission Petition seeking the allocation of funds to Illinois Central for all costs associated with drainage and lighting improvements on a half-mile portion of the Cook County Highway System located at 171st Street in East Hazel Crest.

2. On November 17, 2005, the Commerce Commission entered an order requiring the parties to answer to interrogatories and produce requested documents by January 6, 2006.

3. On April 24, 2006, petitioners moved the Commerce Commission to bar any materials or testimony Illinois Central seeks to introduce into evidence which were produced after January 6, 2006. Petitioners also moved to bar the testimony of Illinois Central's "engineering witnesses for failure to furnish the full report prepared by the engineering firm." (See Motion to Bar at 3).

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II. The Motion To Bar Is Disingenuous Because Illinois Central Timely Complied With The Commission's Order And All Parties Produced Documents After January 6, 2006.

4. On January 6, 2006, Illinois Central complied with the Commerce Commission's scheduling order by providing its Answers to Interrogatories and a Response to Petitioners' Request for Production of Documents to petitioners. (See Illinois Central's Answers to Cook County's Interrogatories and Request to Produce attached as Exhibit 1).

5. To date, Illinois Central has produced over 1,833 documents to petitioners. This production has been ongoing and supplemented on several occasions after January 6, 2006.

6. Petitioners have produced in excess of 9,389 documents to Illinois Central. As detailed below, each production of documents by petitioners also occurred after January 6, 2006:

- a) On February 1, 2006, Cook County produced 9,239 documents;
- b) On February 1, 2006, East Hazel Crest produced 87 documents;
- c) On February 7, 2006, Cook County produced 53 additional documents; and,
- d) On February 10, 2006, East Hazel Crest produced 80 additional documents.

7. Moreover, petitioners named employees of Robinson Engineering as expert witnesses in their answers to Illinois Central's Interrogatories. On February 1, 2006, Robinson Engineering produced 6,928 documents in response to Illinois Central's subpoena. Thereafter, on February 22, 2006, Robinson Engineering produced an additional 7 documents.

8. Furthermore, because of the voluminous nature of documents produced by all parties and third parties, to date, at least 22 depositions have been taken. Currently, only 4 witnesses disclosed by Illinois Central have not been deposed.

9. Petitioners' Motion to Bar requests that the Commission "bar any materials Respondent seeks to introduce into evidence in this matter which were furnished subsequent to the Commission's response cut-off date of January 6, 2006." Petitioners also move to "bar any testimony to be elicited from Respondent's witnesses" based on any such document. (See Motion to Bar at 3).

10. Should the Commerce Commission grant petitioners request, fairness would dictate that all documents and materials produced after January 6, 2006, by both parties, would be barred at trial. Because both parties have produced all of their documents after January 6, 2006, any such ruling would effectively bar the entry of all documents or trial testimony based on those documents.

III. Petitioners Are Not Prejudiced Because Illinois Central Has Produced The Documents At Issue.

11. In the Motion to Bar, petitioners state that Illinois Central failed to produce a report that was prepared by the engineering firm from a company where Illinois Central's expert witnesses are employed, and that the "failure to provide its engineer's report has prejudiced Cook County in preparing its case." (*See* Motion to Bar at 2, ¶¶4-7).

12. However, on April 24, 2006, Illinois Central's counsel hand delivered the report in question. On the same day, petitioners informed Illinois Central that due to "the late production of the report, coupled with scheduling conflicts with the witnesses and their attorney, necessitate taking the Earth Tech witnesses (Illinois Central's experts) next week." (*See* Letter attached as Exhibit 2).

13. In its letter, petitioners did not mention any prejudice due to the late production of the report. Moreover, petitioners did not mention that they had already filed a Motion to Bar because of the non-production of the report. *Id.*

14. Petitioners misstate the facts because the report at issue has been produced by Illinois Central and the Motion to Bar should be denied because petitioners have not been refused any discovery materials to which they are entitled.

15. Moreover, petitioners have not been prejudiced in any way. Sanctioning a party by preventing it from presenting evidence on which its expert has relied would be appropriate only in the extreme situation where a party has violated its discovery obligations and the other party has been prejudiced thereby. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 229 Ill. Dec. 513, 692

N.E.2d 286 (1998)(plaintiff did not act in bad faith or violate any discovery rules and defendant's prejudice was not sufficient to justify the sanction); *see*, Illinois Supreme Court Rule 219.

16. As shown above, Illinois Central has fulfilled its discovery obligations. Moreover, petitioners have not been prejudiced because they have the documents at issue and can have their experts analyze the documents and include their analyses as opinions in petitioners' case-in-chief. Petitioners cannot sit on their hands after receiving properly produced discovery and claim they are been prejudiced.

IV. Petitioners Did Not Comply With Supreme Court Rule 201(k) By Making Personal Consultations And Reasonable Attempts To Resolve The Parties Differences Before Filing The Motion To Bar.

17. Illinois Supreme Court Rule 201(k) requires that "the parties shall facilitate discovery under these rules and shall make reasonable attempts to resolve differences over discovery. Every motion with respect to discovery shall incorporate a statement that counsel responsible for trial of the case after personal consultation and reasonable attempts to resolve differences have been unable to reach an accord or that opposing counsel made himself or herself unavailable for personal consultation or was unreasonable in attempts to resolve differences." Supreme Court Rule 201(k).

18. Here, the Motion to Bar does not contain the mandatory statement that petitioners' have personally consulted and made reasonable attempts to obtain the documents at issue or reach an accord. (*See* Motion to Bar). However, any motion regarding discovery must include a statement that after personal consultation, the parties were unable to resolve their differences. *In re Marriage of Lai*, 192 Ill.Dec. 370, 253 Ill.App.3d 111, 625 N.E.2d 330 (1st Dist. 1993).

19. Moreover, the more drastic the relief requested with respect to an alleged discovery violation, the more necessary is one's compliance with Rule 201(k) and making reasonable attempts to resolve differences. *Id.*

20. Here, petitioners have not made the required showing of a personal consultation or reasonable attempt to resolve differences. Therefore, for this reason also, the Motion to Bar should be denied. *Williams v. A. E. Staley Mfg. Co.*, 48 Ill.Dec. 221, 83 Ill.2d 559, 416 N.E.2d 252 (1981).

CONCLUSION

For the aforementioned reasons, Illinois Central respectfully requests that the Commerce Commission deny petitioners' Motion to Bar in its entirety.

Respectfully submitted,

Illinois Central Railroad Company,

By: Michael T. Franz
One of Respondent's Attorneys

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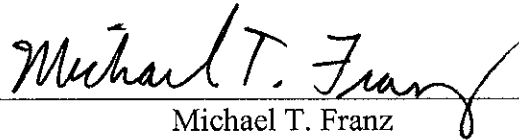
Date: May 8, 2006

*Attorneys for Respondent,
Illinois Central Railroad Company*

#1105755v1

CERTIFICATE OF SERVICE

I certify that on May 8, 2006, I served Illinois Central Railroad Company's Response to Petitioners' Motion to Bar on all attorneys of record by mailing a true copy of same, postage prepaid, to the attorneys listed on the attached Service List from 311 South Wacker Drive, Chicago, Illinois 60606, before 5:00 p.m.


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STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COUNTY OF COOK, THE VILLAGE OF)	
EAST HAZEL CREST and THE VILLAGE OF)	
HAZEL CREST, bodies politic and corporate,)	
)	
Petitioners,)	
)	
v.)	Case No. T05-0051
)	
ILLINOIS CENTRAL RAILROAD)	
COMPANY and THE STATE OF ILLINOIS,)	
DEPARTMENT OF TRANSPORTATION,)	
)	
Respondents.)	

**ILLINOIS CENTRAL'S ANSWERS TO COOK COUNTY'S
INTERROGATORIES AND REQUEST TO PRODUCE**

Respondent, Illinois Central Railroad Company ("Illinois Central"), by its attorneys, Freeborn & Peters LLP, responds to Cook County's Interrogatories and Request to Produce as follows:

Rule 213 Interrogatories

1. Identify each person answering these Interrogatories and each person consulted in the preparation of the answers.

ANSWER: Gregory Guthrie, Senior Manager Technical Services, with the assistance of counsel, was consulted in the organization of these answers. Others consulted include John Henriksen, Devin Sprinkle, Tim Kelly, Rod Nagel, Arthur Spiros, Dave Crader, Alan Craine and Robert Walker.

2. Identify all persons with knowledge of the allegations contained in the Petition.

ANSWER: The following individuals have knowledge regarding the allegations contained in the Petition:

Thomas Zeinz, former IC Engineer of Public Works, has knowledge regarding the condition of Illinois Central's property located at and near the 171st Street overpass. This will include the condition of the underpass during heavy rains. He also has knowledge regarding improvement projects related to drainage and storm water management in the area of the subject Property. Moreover, he was a participant in meetings involving the parties related to proposed improvements at the 171st Street overpass.

David Crader, IC Project Manager, has knowledge regarding the condition of Illinois Central's property located at and near the 171st Street overpass from the years prior to 1997 through the present. This will include the condition of the underpass during heavy rains. He also has knowledge regarding improvement projects related to drainage and storm water management in the area of the subject Property.

John Henriksen, IC Manager of Public Works, has knowledge regarding the condition of Illinois Central's property located at and near the 171st Street overpass from the years prior to 1997 through the present. This will include the condition of the underpass during heavy rains. He also has knowledge regarding improvement projects related to drainage and storm water management in the area of the subject Property.

Arthur L. Spiros, Rail Property Management, has knowledge regarding owners of the subject Property and surrounding area.

Devin Spinkle, IC Manager of Environmental Compliance, has knowledge regarding storm water drainage of IC property to the 171st Street overpass.

Alan Craine, IC Manager of Bridges and Structures, has knowledge regarding documents available regarding the IC portions of the 171st Street overpass.

Donald Lewis, IC Manager of Bridges and Structures, retired, is believed to have knowledge regarding maintenance of the IC portion of the 171st Street overpass.

Tim Kelly, IC Lead Electrician, has had some responsibility for maintenance of lighting located in the 171st Street underpass over the last 25 years. He has knowledge regarding both the type and maintenance of lighting at the 171st Street overpass.

Lynne Corrado and William T. Archer, of METRA, have some knowledge regarding the facilities at the subject Property and discussions among the parties regarding proposed improvements to the 171st Street area.

Various individuals from Robinson Engineering, including but not limited to Aaron Fundich, Joseph Nordman, and William Dolan, have knowledge regarding the 171st Street drainage.

Joseph D. Petraitis, P.E., Earth Tech, has knowledge regarding drainage work and surveys conducted at the Illinois Central yards. Moreover, he has knowledge regarding storm water movement in the area of the Property.

Unknown individuals employed by K-Five Construction, Bowman, Barrett and Associates, STS Consultants, and Airy Construction may have assisted with drainage work on IC property allegedly relevant to the 171st Street overpass.

Investigation continues for additional individuals with knowledge.

3. Identify all documents which establish that the Respondent is a registered rail carrier in the State of Illinois.

ANSWER: No response required, as respondent admitted it was a registered rail carrier in the

State of Illinois in its Answer to paragraph No. 2 of the Petition.

4. Identify the current owners of the subject property.

ANSWER: Illinois Central and METRA share ownership of the railroad bridge on the western side of the 171st Street overpass. In addition to owners of the "subject property," on or about March 28, 1957, the Illinois State Toll Highway Commission purchased property rights from the Illinois Central that relate to the issues in the complaint on or about March 28, 1957.



5. Identify the date the current owners took title to subject property.

ANSWER: Illinois Central acquired the subject property in stages, as reflected on the real estate deeds which have been made available, at various times between November 5, 1917 and April 30, 1918. METRA obtained certain rights regarding a portion of the subject property on or about April of 1987.

*Metra rights
1987
w/ part of 1917-
1918
of 1917-18*

See also the response to Interrogatory No. 4.

6. Identify any conveyances and/or leasehold interests of the subject property during the relevant time period.

ANSWER: Respondent objects to this interrogatory in that it seeks information irrelevant to the issues before the Illinois Commerce Commission. Without waiving this objection, see responses to interrogatories Nos. 4 and 5.

*only for
1987 METRA
w/ 2nd 1/2 grant*

7. Identify any buildings and structures on the subject property.

know 4 by

ANSWER: Four railroad bridges, along with trackage installed thereon, make up the subject property. The IDOT Bridge Numbers for the structures at the 171st Street overpass are identified in paragraph No. 4 of the Petition.

8. Identify the use of the buildings and structures on the subject property during the relevant time period.

ANSWER: The bridges over the 171st Street overpass allow for a grade separation from the underlying roadway. The purpose of the separation is the safety and convenience of train, pedestrian and vehicle traffic.

*under S
not here*

*RR by on
Btr near 171st
old Adm Bldg.
vantage*

*walking
mess
note 7 Bldgs - w*

9. Identify all documents relating to the construction of the subject property and any improvements made to the subject property.

ANSWER: See drawings of the bridge structures and other documents produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

10. Identify all documents relating to the construction and/or installation of a drainage system and maintenance of a drainage system servicing the subject property. The identification shall include the stormwater outlet and drainage ditch referenced in paragraph 13 of the Petition.

ANSWER: See drawings of bridge structure and certain studies by Earth Tech regarding storm water management, ditch grubbing and other documents produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

11. Identify all documents relating to the construction and/or installation of a lighting system and maintenance of a lighting system servicing the subject property.

ANSWER: See response to Interrogatory No. 9.

12. Identify all documents relating to the cost, maintenance, obligations and responsibilities of the drainage and lighting systems servicing the subject property.

ANSWER: Object to the extent it requires a legal conclusion regarding a party's "obligations."

Subject to this objection, see the 1918 ordinance, Quit Claim Deed to METRA, various correspondence between the parties related to the proposed project and other documents produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

13. Identify all persons with knowledge of flooding, lighting and/or drainage problems relating to the subject property.

ANSWER: Respondent objects to the term "problems" as used in this interrogatory. Subject to that objection, numerous IC employees use the 171st Street underpass on a daily basis and have knowledge regarding the conditions of the underpass as it relates to lighting and water on the street. Ann P. Prater, former Mayor of the Village of East Hazel Crest, also has knowledge regarding the "past ... flooding situation." IC employees John Henriksen, Thomas Zeinz, Dave Crader, Devin Sprinkle and others yet to be identified also have personal knowledge regarding the effect of heavy rain on the 171st Street underpass.

14. Identify all documents relating to flooding, lighting and/or drainage problems regarding the subject property.

ANSWER: None known, with the exception of letters attached to the petition as exhibit F.

15. Identify all documents pertaining to Respondent's request for permission to elevate and enlarge portions of Respondent's yards and tracks as alleged in paragraph 7 of the Petition.

ANSWER: None known.

16. Identify all documents relating to discussions and meetings between Respondent and Petitioners relating to the proposed improvements referenced in paragraphs 14 and 18 of the Petition.

ANSWER: See documents produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

17. Identify each and every lay witness that the Respondent intends to call at the hearing of this case pursuant to S.Ct. Rule 213(f)(1), and for each witness state the subject matter of his testimony.

ANSWER: Respondent has not yet selected its witnesses.

18. Identify each and every independent expert witness that the Respondent intends to call at the hearing of this case pursuant to S.Ct. Rule 213(f)(2), and for each witness state the subject matter on which the witness is expected to testify and the opinions the Respondent expects to elicit.

ANSWER: Respondent has not yet selected its witnesses.

19. Identify each and every controlled expert witness that the Respondent expects to call at the hearing of this case pursuant to S.Ct. Rule 213(f)(3), and for each witness state the subject matter on which the witness will testify, the conclusions and opinions of the witness and the bases therefore, the qualifications of the witness, and any reports prepared by the witness about the case.

ANSWER: Respondent has not yet selected its witnesses.

S.Ct. Rule 214 Production Requests

1. All documents evidencing Respondent's registration as a rail carrier in the State of Illinois.

ANSWER: See response to Interrogatory No. 3.

2. All documents relating to the ownership of the subject property.

ANSWER: See deeds produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

3. All documents relating to conveyances or leasehold interests of the subject property.

ANSWER: See response to Interrogatory No. 6. See also the deeds produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

4. All documents relating to the construction of buildings and/or structures on the subject property.

ANSWER: See the bridge drawings and other documents produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

5. All documents relating to the use of all buildings and/or structures on the subject property.

ANSWER: Respondent objects to the request as being overbroad and vague. Without waiving this objection, see documents produced in response to petitioner's request for production

that have been or will be made available for inspection and copying.

6. All documents relating to the construction and improvement of the subject property.

ANSWER: See response to request no. 4.

7. All documents relating to the construction and/or installation of a drainage system and maintenance of a drainage system servicing the subject property, including the stormwater outlet and drainage ditch referenced in paragraph 13 of the Petition.

ANSWER: See response to request no. 4. In addition, see relevant portions of Earth Tech reports that have been or will be produced for inspection and copying.

8. All documents relating to the construction and/or installation of a lighting system and maintenance of a lighting system servicing the subject property.

ANSWER: See response to request no. 4.

9. All documents relating to the cost, maintenance, obligations and responsibilities of the drainage and lighting systems servicing the subject property.

ANSWER: See response to Interrogatory No. 12.

10. All documents relating to flooding, lighting and/drainage problems regarding the subject property.

ANSWER: None known.

11. All documents relating to Respondent's request for permission to elevate and enlarge portions of its yards and tracks as alleged in paragraph 7 of the Petition.

ANSWER: See response to Interrogatory No. 15

12. All documents relating to discussions and meetings between Respondent and Petitioners relating to the proposed improvements referenced in paragraphs 14 and 18 of the Petition.

ANSWER: See response to Interrogatory No. 12.

13. All documents Respondents intend to introduce at the hearing of this case.

ANSWER: No such list exists at this time.

14. All documents relied upon, prepared, used, viewed, produced, authorized, or known to exist by Respondents or its witnesses which relate to the subject property.

ANSWER: See documents produced in response to petitioner's request for production that have been or will be made available for inspection and copying.

15. All documents relating to, referred to, or relied upon by you in preparing your answers to any and all of Petitioner's Interrogatories.

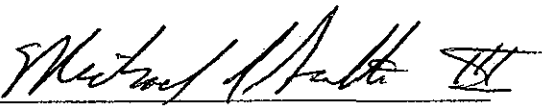
ANSWER: Objection to those documents protected by the attorney client privilege. Subject to that objection, see documents produced in response to Petitioner's requests for production which have been or will be made available for inspection.

16. All documents Respondents intend to use at the hearing set in this matter.

ANSWER: Unknown at this time.

Respectfully submitted,

ILLINOIS CENTRAL RAILROAD COMPANY,

By: 
One of Respondent's Attorneys

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Michael T. Franz
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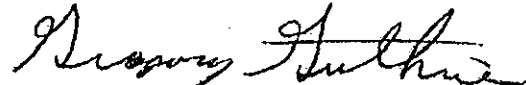
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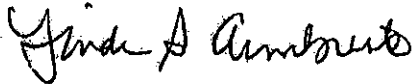
*Attorneys for Respondent,
Illinois Central Railroad Company*

Date: January 6, 2006

VERIFICATION

The undersigned, Gregory Guthrie, declares that he has read the foregoing interrogatories and states that the answers provided therein are true, correct and complete to the best of his knowledge and belief.


Gregory Guthrie



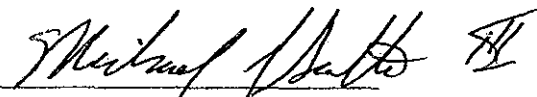
Subscribed and Sworn to before me
this 6th day of January, 2006.

Notary Public



CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the attached **ILLINOIS CENTRAL'S ANSWERS TO COOK COUNTY'S INTERROGATORIES AND REQUEST TO PRODUCE** was served on the parties listed on the attached Service List by depositing same in the U.S. Mail, with proper postage prepaid, at 311 S. Wacker Drive, Chicago, Illinois 60606, on January , 2006.


Michael J. Scotti, III

989784/05200-0095

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COOK COUNTY, ILLINOIS

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STATE'S ATTORNEY

April 24, 2006

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Re: *County of Cook v. Illinois Central Railroad*, T05-0051

Dear Mr. Franz:

In response to our many requests that the Railroad provide us with all reports prepared by Earth Tech in this matter, our office received today a 380 page redacted report dated September, 2001. You are hereby advised that we will object to these materials (bate stamps IC001453-IC001833) being used by your witnesses or the introduction of any information contained in the reports as untimely.

Notwithstanding our objection, I am forwarding the materials to our engineers for their review. If necessary, we will provide you with a rebuttal opinion based upon the contents of the report. It was our intent to complete the depositions of the Earth Tech personnel disclosed in your supplemental answers this week. Unfortunately, the late production of the report, coupled with scheduling conflicts with the witnesses and their attorney, necessitate taking the Earth Tech witnesses next week.

On a related discovery matter, you will recall that last week, when Thomas Zeinz was not produced for his scheduled deposition, you advised me that you did not believe you would be calling Mr. Zeinz as a witness any longer. Please confirm your withdrawal of Mr. Zeinz as a witness on behalf of the Railroad. In similar fashion, I have been informed by Michael Blaszk, attorney for Earth Tech, that John Lucas, one of your named experts, did not participate in the preparation of any reports and questions his participation in this matter. Please advise if you still intend on calling Mr. Lucas as an expert witness in the proceeding.

Finally, please verify that you have produced all easement agreements relating to the areas affected by the proposed improvements. While your recent submission of bate

stamp nos. IC001169-IC001452 included some easement agreements, it appears that the easement agreements between the Railroad and the easement holders for the area of the proposed detention area are missing. This would include any and all agreements between NICOR and fiber optic companies McCloud and 360.

Should you have any questions, please call.

Sincerely, 

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Assistant State's Attorney
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312.603.4637

cc: Michael Blaszk